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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

GANNETT CO., INC.,
GUAM PUBLICATIONS, INC.
d/b/a PACIFIC DAILY NEWS,

Petitioners,

v.

HAMMER DEROBURT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT HAMMER DEROBURT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

'WHETHER THE COURT OF APPEALS ERRED IN REFUSING TO UPHOLD THE DISMISSAL OF PLAINTIFF'S LIBEL CLAIM ON THE BASIS OF THE ACT OF STATE DOCTRINE, WHERE (A) THE PLAINTIFF WAS MISIDENTIFIED AS THE HEAD OF STATE WHO PERFORMED A PARTICULAR ACTION, (B) THE ACTION WAS CHARACTERIZED IN THE DEFAMATORY ARTICLES AS SECRET, ILLEGAL AND IMPROPER, AND (C) THE LEGALITY OR VALIDITY OF AN ACT OF STATE IS NOT RELEVANT TO EITHER PARTY'S PROOF ON THE ISSUE OF THE TRUTH OR FALSITY OF PETITIONERS' STATEMENT THAT RESPONDENT PERFORMED THE ACTION.

II.

WHETHER A MEDIA DEFENDANT IS ABSOLUTELY IMMUNE FROM DEFAMATION LIABILITY UNDER THE FIRST, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR PUBLISHING FALSE STATEMENTS OF FACT CONCERNING A FOREIGN HEAD OF STATE WITH KNOWING OR RECKLESS FALSITY.

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STATEMENT OF THE CASE

Petitioners seek this Court's Writ of Certiorari to review an order of the United States Court of Appeals for the Ninth Circuit reversing the District Court's dismissal of the plaintiff's libel case on the basis of the act of state doctrine. Hammer DeRoburt ("DeRoburt"), currently the President of the Republic of Nauru, brought this action for libel in 1978 against the Petitioners, Gannett Co., Inc. and its subsidiary, Guam Publications, Inc. (collectively, "Gannett"). Two articles published on May 30, 1978 (the "May 30 article") and on June 29, 1978 (the "June 29 article")

in Gannett's Guam newspaper, the *Pacific Daily News*, reported that DeRoburt, while President of Nauru, had made and personally delivered a loan of government funds described as secret, illegal and improper to a political "separatist movement" in the neighboring Marshall Islands. In fact, DeRoburt had neither made nor delivered such a loan; but his predecessors had approved and closed a loan to the Marshall Islands Nitijela (legislature) immediately before DeRoburt's sudden and unexpected reelection as President after the preceding government fell from power under Nauru's parliamentary system of government.

THE PARTIES

Respondent Hammer DeRoburt became President of the Republic of Nauru in 1968, when Nauru gained its independence. DeRoburt remained President until 1977, when he fell from power. Opposition party member Bernard Dowiyogo and his successor from the same party, Lagumot Harris, held the Presidency of Nauru for slightly over a year. On May 11, 1978, the Harris government fell and DeRoburt was reelected President.

Petitioner Gannett is one of the largest newspaper publishers in the United States. Through its Pacific subsidiary, Guam Publications, Inc., it publishes the *Pacific Daily News*. Styling itself as the "Voice of the Pacific," this daily newspaper is virtually the only source of news for many islands in the western and central Pacific.

PROCEEDINGS BELOW

DeRoburt filed this action for defamation over six years ago on October 2, 1978. The complaint and first amended complaint asserted that the May 30 article falsely and maliciously accused DeRoburt of personally lending government funds to the Marshall Islands Political Status Commission (the "MIPSC"), of committing serious crimes under the laws of Nauru, and of interfering with the internal affairs of the Marshall Islands in violation of accepted standards of international diplomacy.

Gannett moved for dismissal of counts 1 and 2 of the complaint on the ground that Nauruan law did not apply, and for summary judgment on the remaining counts based on an asserted absence of actual malice. The District Court denied the motion in its entirety. *DeRoburt* v. *Gannett Co.*, 83 F.R.D. 574 (D. Haw. 1979). It held that "the libel law of Nauru together with the First Amendment safeguards of *New York Times* v. *Sullivan* and its progeny" would govern DeRoburt's claim. 83 F.R.D. at 580-83. The court further held that DeRoburt had raised genuine issues of material fact as to Gannett's actual malice. 83 F.R.D. at 583-585.

DeRoburt then moved to amend the complaint to conform it to evidence adduced in discovery and to implement the District Court's holding that the libel law of Nauru governed. The second amended complaint added the June 29 article as a basis for liability and divided the allegations of falsity into two categories: those concerning the identification of DeRoburt as the maker of the loan and his reported activities in connection therewith, and those concerning Gannett's characterization of the loan as secret, illegal and improper. The third amended complaint was identical in substance to the second amended complaint and increased the *ad damnum*.

During discovery, Gannett's employees categorically refused to disclose the identity of their sources. Cisco Uludong, the May 30 article's author, admitted that the statements at the heart of the defamation claim—those concerning DeRoburt's alleged involvement in the loan—were based solely on unnamed "sources," but refused to disclose *any* information concerning how or from whom he had supposedly obtained his facts. Uludong Deposition at 89-90, 376-77, 422-32, 472, 484-85. John Simpson, the managing editor of the *Pacific Daily News*, admitted that he had deliberately destroyed copies of his reporter's notes and memoranda containing the name of the source or sources so that they could not be subpoenaed as evidence:

> After I had got this material together, I reflected that there then was material that possibly could be subpoenaed

> that existed. You had told me that a suit was coming. And I said to myself, "If the material doesn't exist, it can't be subpoenaed." So I destroyed it.

Simpson Deposition at 29-30.

Upon DeRoburt's motion to compel disclosure of sources, the District Court ordered (1) that Gannett be compelled to disclose the sources, (2) that upon failure to disclose within sixty days of the order, a presumption would arise that Gannett had no sources, and (3) that disclosure of the sources within a reasonable time before trial would remove the presumption. *DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981). In its subsequent second pretrial order, the court held that a reasonable time for disclosure had passed and that Gannett would be barred from introducing at trial "any evidence that Mr. Uludong had any source for the stories giving rise to this litigation." Trial was set for November 9, 1982.

On August 6, 1982, Gannett moved to dismiss the complaint for failure to state a claim on which relief could be granted based on the act of state doctrine. The District Court granted the motion on October 13, 1982. *DeRoburt* v. *Gannett Co.*, 548 F. Supp. 1370 (D. Haw. 1982). While its reasoning was not entirely clear, the court concluded that

> the issues raised by the defendants' characterization of the loan are sufficient alone to raise an effective act of state defense, and therefore it need not decide whether the questions surrounding DeRoburt's involvement in the loan implicate act of state considerations . . . That such an examination must be prevented can be discerned simply by supposing that the jury will find in defendants' favor on all relevant issues.

548 F. Supp. at 1383-84 (footnote omitted).

DeRoburt then filed motions for reconsideration and for leave to file an amended complaint on October 22, 1982. The proposed fourth amended complaint dropped all allegations asserting the

legality and propriety of the loan made by DeRoburt's predecessors. The proposed complaint asserts simply that Gannett's articles defamed DeRoburt by falsely accusing him of performing an act characterized as secret, illegal and improper. The District Court denied both motions on November 30, 1982, holding that the issue of DeRoburt's "involvement" in the loan required an impermissible inquiry into the "motivation" of a foreign state. *DeRoburt* v. *Gannett Co.*, 551 F. Supp. 973 (D. Haw. 1982).

On appeal, the Ninth Circuit unanimously reversed and remanded the case for further proceedings:

> After a review of the fourth amended complaint, this court believes the balance tips in favor of the plaintiff and against the application of the act of state doctrine. As pleaded, this case has become one more akin to a misidentification situation. Although resolution of the instant controversy might to some degree encroach on areas best left untouched by the judiciary, this court believes any such intrusion would be minimal and plaintiff should not be barred by the application of the act of state doctrine.

DeRoburt v. *Gannett Co.*, 733 F.2d 701, 704 (9th Cir. 1984.) The Ninth Circuit recognized that Respondent may well be able to maintain this action without intruding upon those areas in which the act of state doctrine precludes judiciary inquiry. The Ninth Circuit unanimously denied Gannett's petition for a rehearing and rejected its suggestion for a rehearing *en banc*. Gannett did not seek a stay of the Ninth Circuit's mandate, and the case was remanded to the District Court for further proceedings.

At a hearing on remand held on December 6, 1984, the District Court denied Gannett's application for a stay pending this Court's disposition of the instant petition, ordered the filing and service of the fourth amended complaint, established a schedule for final discovery and set a firm trial date for August 6, 1985.

BACKGROUND OF THE CASE

In the six weeks prior to a scheduled referendum in the Marshall Islands, the *Pacific Daily News* published two articles concerning a loan supposedly made and delivered by Hammer DeRoburt, as President of the Republic of Nauru, to the Marshall Islands Political Status Commission ("MIPSC"). The May 30 article, authored by Cisco Uludong, Gannett's Saipan reporter and a political activist, charged that Hammer DeRoburt, shortly after his reelection, made a secret, illegal and improper loan to the MIPSC after his predecessors in office had turned down a prior loan request for fear of being accused of "meddling" in Micronesia's internal affairs. It also stated that DeRoburt flew to the Marshall Islands for the express purpose of delivering the proceeds of the loan. The article is reprinted in full in appendix F to the Petition.

The May 30 article's statements concerning DeRoburt are undeniably false. Government officials in both Nauru and the Marshall Islands have repeatedly stated under oath that DeRoburt simply had nothing to do with the loan. The statement of David Lang, Nauru Secretary for Justice at the time, is representative:

> 26. * * * * As I have made clear:
>
> (a) The plaintiff did not make the loan;
>
> (b) The plaintiff did not hand over the cheque;
>
> (c) The plaintiff was not present when the cheque for the loan was handed over;
>
> (d) The cheque was handed over in Nauru and not in the Marshalls;
>
> (e) The plaintiff was not President of Nauru, was not a member of the Cabinet, was not a member of the board of RONFIN [Republic of Nauru Finance Corporation] in relation to the loan and was not party to any decision in relation to the loan.

> 27. The plaintiff was elected President of Nauru on the resignation of President Harris on May 11, 1978, after the loan was made and complete.

Affidavit of David Lang, at 12.[1] *See also* Affidavit of Atlan Arien, Speaker of the Marshall Islands Nitijela (legislature), at 2, ¶¶ 7, 9 ("The story of May 30, 1978 is unequivocally false. While there have been transactions involving the Marshall Islands Nitijela and The Republic of Nauru Finance Corporation . . . , His Excellency, Hammer DeRoburt was in no way involved in these transactions. . . . At no time was Hammer DeRoburt a participant on any basis whatever in any of the transactions involving the Marshall Islands Nitijela and Marshall Islands Constitutional Convention during the period February to mid-May, 1978, when such transactions took place.").

The June 29 article was authored by Gannett reporter Paul Addison. Headlined "Nauru Officials Admit Lending Separatists' Loan," the article repeated the defamation contained in the May 30 article, stating: "Sources have said that shortly after his re-election in early May, DeRoburt flew to the Marshalls to deliver the separatist Marshalls Political Status Commission a $600,000 check." The article further reported that two Nauru government officials, David Lang and Peter Jones, had "refused to answer any questions about the loan." The June 29 article is reproduced in full in appendix G to the Petition.

Again, discovery evidence demonstrated not only that Lang and Jones had responded to questions about the loan but that the content of their responses explicitly informed Addison that the statements subsequently republished were entirely false:

---

1. As in the Court of Appeals, Gannett grossly mischaracterizes certain documents allegedly "linking [DeRoburt] to the loan" and cites to a Marshallese resolution "thanking him for his involvement in the loan." Petition at 11 n.8. In fact, the resolution in question mentions "financial assistance," not a "loan," and specifically thanks "the Honorable Kinza [sic] Dowiyogo, the President of the Republic of Nauru *at the time of the financial assistance*" (emphasis added), and only mentions DeRoburt in keeping with normal diplomatic courtesies because he was the Nauruan President when the resolution of thanks was passed.

> I replied, " . . . I regard your story as largely fabricated. Before publishing it, your newspaper could not have checked its accuracy with anyone who really knew about the loan at all. You alleged that Hammer DeRoburt played a major part in the loan. In fact, as I've told you, he was out of office when it was made and did not have the slightest thing to do with it, let alone fly to the Marshalls with the cheque."

Affidavit of David Lang, at ¶1-12.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES RAISED ON THIS PETITION FROM A NON-FINAL ORDER ARE NEITHER RIPE NOR APPROPRIATE FOR THIS COURT'S CONSIDERATION

A. Any Ruling On The Act of State Doctrine Should Await Further Development Of The Record

The Ninth Circuit's opinion in this case contemplated the possibility of further proceedings regarding the applicability of the act of state doctrine. Only the further narrowing of the issues in preparation for trial and the development of a trial record will enable the District Court and any reviewing court to determine whether the act of state doctrine is necessarily implicated.

The act of state doctrine "is, in its origins and essences, a federal rule mandating a choice of law by which to judge the validity of the official actions of sovereign states." *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. at 11 (S.D.N.Y. November 9, 1984). As this Court has stated:

> [The doctrine] does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.

Ricaud v. *American Metal Co.*, 246 U.S. 304, 309 (1918). Under this view, dismissal is appropriate only when the court's inability to invalidate a foreign act of state precludes a possibility of any relief for an opposing party. *Sharon* v. *Time, Inc.*, slip op. at 11.

To the extent that the act of state doctrine is implicated at all in this lawsuit, Respondent is confident that he can proceed to trial under the fourth amended complaint and obtain a judgment without treading in areas precluded by that doctrine. If, following a trial on the merits, a contention is made that plaintiff has been unable to avoid the effects of the act of state doctrine, the District Court, the Ninth Circuit Court of Appeals, and ultimately this Court on certiorari will have the opportunity to review that judgment. At this juncture, in a six year old case where the parties are poised to complete discovery and proceed to trial, any consideration of dismissal on the ground of the act of state doctrine would be premature. *See Temistocles Remirez de Arellano* v. *Weinberger*, No. 83-1950, slip op. at 39, 49 (D.C. Cir. October 5, 1984) (*en banc*); *Associated Container Transportation (Australia) Ltd.* v. *United States*, 705 F.2d 53, 62 (2d Cir. 1983). Simply stated, the act of state issue is not yet ripe for this Court's review. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*).

Gannett does not argue that the principles applied by the Ninth Circuit panel create a conflict with the positions of the other courts of appeals. In fact, Gannett's primary point is that the panel misapplied its own Circuit's view of the act of state doctrine—a point which the Ninth Circuit judges unanimously rejected when they declined to review the panel's decision *en banc*. Respondent knows of only two American libel cases in which the defendant has asserted the act of state doctrine: this case and *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. (S.D.N.Y. November 9, 1984). Judge Sofaer's *Sharon* decision permitting the case to go to trial is fully consistent with the Ninth Circuit's decision in this case. Under these circumstances, this interlocutory order refusing to dismiss the complaint presents

legal issues that are neither "fundamental to the further conduct of the case," *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945), nor of "peculiar gravity and general importance," *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916). Gannett offers no compelling reason to justify the issuance of the Writ at this stage.

B. This Court Should Not Entertain Arguments Not Presented To The Courts Below

In a desperate about-face, Gannett now argues that its statements concerning DeRoburt are absolutely privileged under the First and Ninth Amendments to the Constitution because DeRoburt is a foreign head of state. Gannett neglected to raise this issue in either lower court. Thus, there are crucial questions for which there is no record support. For example, Gannett baldly asserts that President DeRoburt, as a head of state, enjoys "ready access to the media." Petition at 22. Yet, there has been no record developed with regard to DeRoburt's presumed access to the press.[2] In fact, DeRoburt lacks the access to the media that heads of larger states may sometimes have, since his isolated island nation is not heavily populated and does not even have its own daily newspaper. Gannett does not dispute that the only regular source of news in the Pacific region is the *Pacific Daily News* itself. Most importantly, Gannett actually represented to the District Court that it was *not* making an absolute immunity argument:

> An even more obvious "straw man" argument is DeRoburt's claim that "Gannett again claims absolute immunity from liability because plaintiff is a foreign government official." . . . The fact that DeRoburt is a foreign government official is not critical to this motion.

2. Gannett's only specific evidence regarding DeRoburt's access to the media is its self-serving citation to its own interview of him in April, 1978.

Reply Memorandum to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (filed September 2, 1982). Gannett's failure to present the issue of absolute immunity to either the District Court or the Court of Appeals should preclude this Court's consideration of the issue. *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 103 S. Ct. 2209, 2212 n.6 (1983); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Like the act of state issue, Gannett's strained absolute privilege argument presents no authority conflicting with prior decisions of this Court or of another court of appeals. In Gannett's own words, the issue's lack of importance "is demonstrated by the absence of any reported United States cases in which a foreign government or foreign official has sued for statements describing the official acts of that government or official." Petition at 26. The Court should not address Gannett's recently concocted absolute privilege argument.

II.

TRIAL UNDER THE FOURTH AMENDED COMPLAINT WILL NOT REQUIRE THE COURT AND JURY TO ADDRESS THE LEGALITY, VALIDITY OR MOTIVATION OF ANY ACT OF STATE

Although the act of state doctrine precludes adjudication of the legality, validity or motivation of a sovereign act of a foreign state, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Underhill* v. *Hernandez*, 168 U.S. 250 (1898), such legality, validity and motivation are no longer issues in this case. Examination of the substantive elements of Hammer DeRoburt's libel claim and of the permissible defenses thereto shows that the Court of Appeals was manifestly correct in determining that the act of state doctrine does not mandate dismissal of the case.

The falsity issue here is identical to that presented in every defamation case under American law. DeRoburt must simply prove publication of a false statement about him. Gannett will

be free, but not required, to prove the truth of its statements. Proof of falsity here arises in the most straightforward context imaginable in libel law: that of misidentification. Gannett's articles reported that Hammer DeRoburt, as President of Nauru, made a secret, illegal and improper loan. The heart of the defamation is in Gannett's false identification of Hammer DeRoburt by name as the perpetrator of an act so characterized. DeRoburt will show that he never performed such an act, and that the mere association of his name with actions called secret, illegal and improper has defamed him.

As the District Court recognized, the libel comprises two factual elements: the charge of making a loan and its characterization as secret, illegal and improper. The flaw in the District Court's reasoning was its assumption that DeRoburt must offer evidence and the court or jury must make findings on *both* elements to establish falsity, when in fact they must address only the misidentification element. Specifically, DeRoburt will prove the following historical facts:

> (a) He did not make the 1978 loan described in the story;
>
> (b) His predecessors as President did not turn down an application for a loan from the Marshall Islands legislature; a loan was approved, closed and funds delivered on May 10, 1978 by the Governments of President Dowiyogo and President Harris while DeRoburt was out of office and leading the opposition in Parliament; and
>
> (c) the Marshallese did not renew or make a request for any loan to DeRoburt after he took office on May 11, 1978, and he neither approved any loan nor flew to the Marshall Islands to deliver any check.

Evidence establishing these facts will satisfy DeRoburt's *prima facie* case on falsity. DeRoburt need not prove that the loan attributed to him by Gannett was "open, legal and proper" because he never made any loan. In this respect, Gannett's charge is false and defamatory solely because Gannett attributed

an act it described as secret, illegal and improper to the wrong person.

In cases where journalists have falsely accused the wrong person of breaking the law or other improper conduct, plaintiffs have never been required to prove the legality or propriety of the conduct falsely imputed to them. *See, e.g., Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971) (newspaper erroneously reported that plaintiff, rather than his brother, had been charged with perjury); *Brewer* v. *Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980) (plaintiff's wife mistakenly identified by name and photograph as woman visiting Elvis Presley in hotel suite; imputation of cuckoldry to plaintiff and adultery to his wife), *cert. denied*, 452 U.S. 962 (1981); *Ryder* v. *Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976) (omission of middle initial and address caused public confusion of plaintiff with another attorney who had been suspended from practice); *Harkaway* v. *Boston Herald Traveler Corp.*, 418 F.2d 56 (1st Cir. 1969) (plaintiff named as law partner of underworld figure who was not an attorney); *Washington Post Co.* v. *Kennedy*, 3 F.2d 207 (D.C. Cir. 1925) (plaintiff's age and profession given in identifying criminal with same name as plaintiff); *Mathis* v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978) (plaintiff's picture mistakenly published as that of bank robber with same name); *Liquori* v. *Republican Co.*, 5 Med. L. Rep. (BNA) 2180 (Mass. App. 1979) (plaintiff's address published as that of convicted criminal with same name); *News Leader Co.* v. *Kocen*, 173 Va. 95, 3 S.E.2d 385 (1939) (plaintiff's address given as that of criminal with same name).

DeRoburt does not need to prove anything about the characteristics of the *actual* loan made by his predecessors in office. If a publication states that A committed a murder, and A proves at trial that B in fact caused the death, it adds nothing to A's libel case to prove that B's action did not constitute murder, or was justified, or that B was acquitted. If a newspaper states that A has entered into a bigamous marriage, and A proves at trial that he is single and the article in fact concerns his business partner B,

he would have no reason to prove that B's marriage actually is not bigamous. Similarly, if DeRoburt proves at trial that he was misidentified as a maker of an illegal loan, positive evidence of the legality of a loan made by his predecessors adds nothing to proof of falsity.

Under these circumstances, the District Court's holding that "resolution of the central issues in this case . . . will inevitably lead to this court's examining or 'sitting in judgment on' the validity, legality and motivation of the government of Nauru in making the 1978 loan to the Marshall Islands," was properly reversed. In accordance with the allegations of the fourth amended complaint, DeRoburt's proofs concerning the actions of his predecessors will be limited to establishing the simple historical facts underlying the actual loan to the Marshall Islands—*who* made the loan, *when* and *where* the loan was made, and *how* the loan was made—to establish that he was not involved. In these circumstances, the court and jury will not need to examine or adjudicate *why* his predecessors made the loan or *whether the loan was valid under any law.*

Such a limited and tangential inquiry into the circumstances surrounding a sovereign act is clearly permissible under the act of state doctrine. As one court has observed in holding the doctrine inapplicable to a claim of breach of contract and refusal to deal, " 'Precluding all inquiry into the motivation behind or *circumstances surrounding* the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action'. . . . [The plaintiff] does not ask the court to pass judgment on any foreign sovereign's act or policy." *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048-49 (9th Cir.), *cert. denied*, ——U.S.——, 104 S.Ct. 156 (1983) (emphasis added) (quoting *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980)). In *Mitsui*, an antitrust case involving the development of timber resources in Indonesia, the court stated:

> [N]either the validity of [Indonesia's] regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability. . . .
>
> * * * *
>
> To determine whether there has been a violation of American antitrust law it is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license.

594 F.2d at 49, 53. In *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), a decision on which Gannett heavily relies and whose broad holding was criticized explicitly in *Mitsui* and implicitly in *Northrop*, the dissenting member of the panel observed that the act of state doctrine does not

> prohibit judicial scrutiny of the conduct of foreign officials. Indeed, the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign sovereign. *See Alfred Dunhill of London, Inc.* v. *Republic of Cuba* . . . . Federal courts have not hesitated to receive evidence concerning the acts of foreign officials and the role played by American citizens in motivating such acts . . . . The proscription of the doctrine is against judicial determination of the validity of the acts of a foreign sovereign . . . . and judicial redress of grievances predicated upon a finding of invalidity.

Id. at 79-80 (Van Graafeiland, J., dissenting) (citations omitted).[3] *See also United States* v. *Pink*, 315 U.S. 203 (1942);

3. Gannett claims that "[t]he line of cases expressly barring adjudication of this issue [of who was responsible for an act of state] remained unbroken until the Ninth Circuit panel ignored them in this case." Petition at 14 n.8. This "line of cases" however, has little to do with the issue here. *See American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) (to recover, plaintiff must show sovereign acts of Panamanian government to be illegal under U.S. antitrust laws); *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984) (plaintiff could only succeed if it showed successful bribe of foreign official); *Hunt* v. *Mobil Oil Corp.*,

Shapleigh v. *Mier*, 299 U.S. 468 (1937); *Phoenix Canada Oil Co.* v. *Texaco Inc.*, 560 F. Supp. 1372, 1381 (D. Del. 1983); *D'Angelo* v. *Petroleos Mexicanos*, 398 F. Supp. 72, 77-78 (D. Del. 1975); *Reavis* v. *Exxon Corp.*, 90 Misc. 2d 980, 396 N.Y.S.2d 774 (Sup. Ct. 1977) (act of state doctrine does not bar examination and interpretation of legal effect of acts of state where validity is not in issue).

Most significantly, in *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. at 9-10 (S.D.N.Y. November 9, 1984), the only other reported American libel decision to address the act of state doctrine, the court held:

> By contrast, the litigation here involves no challenge to the validity of any act of state. With respect to Sharon's alleged acts, no one is suggesting that these acts—by which Time claims Sharon condoned the massacre of unarmed noncombatant civilians—have validity in the sense that they cannot be attacked. All agree—Israel, the United States, and the world community—that such actions, if they occurred, would be illegal and abhorrent. *The issue in this litigation is not whether such acts are valid, but whether they occurred.* (emphasis added).

Viewed in the light of the proscriptions of the act of state doctrine, DeRoburt's evidence concerning facts, circumstances, and occurrences relating to the making of the loan by his predecessors does not implicate any act of state concerns. The legality, validity and motivation of acts of the Republic of Nauru are

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550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (damage if any resulted from acts of Libyan government); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (antitrust claim would require "proof of damage resulting from forbidden conduct" of foreign state); *General Aircraft Corp.* v. *Air America, Inc.*, 482 F. Supp. 3, 6 (D.D.C. 1979) (alleged injury resulted directly from acts or decisions of a foreign government); *Bokkelen* v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977) (necessary inquiry into *why* Brazilian government denied import licenses). Clearly, these decisions are all factually distinguishable from this case.

simply not relevant to the truth or falsity of the Petitioners' statements.[4]

Nor are such issues material to any defense of truth that Gannett might muster. Even if the merits of Gannett's defense were properly before the Court on a motion to dismiss, Gannett's defense of truth at trial will be limited to rebutting DeRoburt's proof that the following statements are false:

> Sources say that shortly after his reelection earlier this month, Nauru President Hammer DeRoburt . . . gave the separatists $600,000 of the $1 million they originally requested.
>
> * * * *
>
> The sources said Marshallese separatist leaders had earlier approached DeRoburt's predecessors about the loan but were politely turned down because Nauru officials did not want to be accused of "meddling" in Micronesia's internal affairs.

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4. Gannett argues that this Court must consider the "context in which the so-called 'historical facts' would have to be adjudicated." Petition at 14 n. 6. If context were the determining factor, every action involving an act of state, even tangentially, would be barred by the act of state doctrine. Clearly this is not the law. *See, e.g., Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964); *Associated Container Transportation (Australia) Ltd.* v. *United States*, 705 F.2d 52, 61 (2d Cir. 1983); *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1040 (9th Cir. 1983), *cert. denied*, 445 U.S. 903 (1980).

Gannett cites *Buttes Gas & Oil Co.* v. *Hammer*, [1981]3 W.L.R. 787 (H.L.). Not only is *Buttes* an English decision cited for a proposition of purely federal law, it was not a misidentification case. The action there was dismissed not under the traditional act of state doctrine (on which Gannett relies here), but rather on a general theory of abstention akin to the political question doctrine (which Gannett does not even discuss). *See Sharon* v. *Time, Inc., supra*, slip op. at 15. Moreover, the truth or falsity adjudication in *Buttes* necessarily would have required deciding whether the Ruler of Sharjah conspired to fraudulently backdate a decree. Finally, Gannett mischaracterizes the disposition in *Buttes*. Gannett's quotation regarding the slander claim was pure dicta, since the plaintiff Buttes voluntarily offered to stay that claim and the Court held merely that "he should be held to this offer." *Id.* at 811.

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> The Marshallese renewed their request to DeRoburt after he took office. He approved it and flew to the Marshalls to personally deliver the check, sources said.

See Petition, appendix F.

For purposes of the act of state doctrine, Gannett's defense of truth is a mirror image of DeRoburt's claim of falsity. *Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616, 620 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (defendant's proof of truth is limited to gist or sting of libel alleged by plaintiffs). Like DeRoburt's proof, the defense is limited to the bare historical facts and circumstances concerning the mechanics of the loan. No question of validity, legality or motivation of an act of state is involved, and evidence on that point is irrelevant.

Gannett bears the burden of showing that the act of state doctrine bars this action. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 690-96 (1976). Gannett can carry that burden only if it shows that a verdict for DeRoburt "would necessitate direct judicial inquiry into [the acts of state]." *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir.) *cert. denied*, —U.S.—, 104 S.Ct. 156 (1983). As the Ninth Circuit stated in *Northrop:*

> Whether [the plaintiff] can eventually establish the amount of damages without implicating foreign procurement decisions, and whether that implication is permissible, are disputed questions which we need not address at this stage of the proceedings.

Id. at 1048. Because Gannett cannot show that plaintiff is unable to recover without implicating act of state concerns, it has not carried its burden of proof.[5] Neither should this Court address

5. In the midst of its argument that adjudication of truth or falsity is barred by the act of state doctrine, Gannett slyly states that "this libel action would require a jury to decide *whether it is defamatory* to say that a head of state of one country secretly lent money to a separatist group in another country." Petition at 11 (emphasis added). Besides being irrelevant to Gannett's "truth or falsity" argument, the statement is incorrect. Gannett itself characterized the loan as "illegal," and that unambiguous allegation is arguably defamatory as a matter of law. In any event, defamatory meaning looks only to a statement's effect on a

such remote or speculatively[6] based issues at this stage of the proceedings. The Ninth Circuit recognized that further act of state issues may arise in further pretrial proceedings and at trial and rightly saw no barrier to proceeding despite that possibility. It is high time to move this six-year old case to trial.

III.

GANNETT IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR DEFAMATORY STATEMENTS PUBLISHED WITH ACTUAL MALICE UNDER EITHER THE FIRST OR NINTH AMENDMENTS TO THE CONSTITUTION

Whether or not properly raised, *see* Point I B *supra*, Gannett's absolute immunity argument has no merit. Conceding that no judicial decision has ever recognized an absolute privilege for false statements of fact concerning foreign officials (and marshalling such authorities as the Declaration of Independence), Gannett asks this court to overrule *New York Times Co.* v. *Sullivan* and its progeny to prohibit libel actions by "foreign heads of state" even for knowing lies. The proposition is legally without merit and has extraordinarily pernicious implications. Accordingly, this Court should not entertain argument on this point.

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person's reputation in the minds of its readers, and that inquiry implicates no act of state concern.

6. Gannett's resort to speculative argument is another indication of the lack of substance in its position here. *See* Petition at 17-18. We doubt very much that the hypothetical libel suit postulated there, based loosely on the facts of *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, —U.S.—, 104 S.Ct. 703 (1984), would be dismissed under the act of state doctrine if the hypothetical plaintiff simply denied making any payment whatsoever, whether legal or not.

A. This Court Has Repeatedly Held That The First Amendment Does Not Grant Absolute Immunity for False Statements of Fact Published with Actual Malice and Nothing In The Record of This Case Suggests That Abandonment of the Rule of *New York Times Co.* v. *Sullivan* Is Appropriate

Gannett argues that the First Amendment provides an absolute privilege for defamatory statements regarding the official acts of foreign heads of state. In support, Gannett relies on the two rationales used to justify adoption of a conditional privilege in *New York Times Co.* v. *Sullivan* and its progeny: (1) the superior access to the media presumed to be available to the public official or public figure; and (2) the "normative conclusion" that a public official or public figure "assumes the risk" of defamatory statements and is less deserving of recovery than a private individual. Gannett makes these arguments in the absence of any record evidence on the points. Neither rationale supports the adoption of an absolute immunity for defamation in the context of this case.

Gannett urges this Court to overrule virtually every libel decision rendered in the past twenty years, including, among others: *Herbert* v. *Lando*, 441 U.S. 153 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); and *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). In each of these cases, this Court balanced the public official's or public figure's fundamental right to his reputation with the public interest in protecting the press from inordinate defamation liability. In *New York Times*, this Court specifically rejected the view of Justices Black, Goldberg and Douglas that the press should enjoy absolute immunity for statements regarding the official conduct of public officials. 376 U.S. at 293 (concurring opinion of Black, J.); *Id.* at 297 (concurring opinion of Goldberg, J.). This court also rejected that minority view in *Garrison, Rosenblatt, St. Amant* and *Gertz*. In *Gertz*, 418 U.S. at 341, the majority noted:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. (citations omitted).

In *Herbert* v. *Lando*, 441 U.S. at 158-60, 176, this Court stated:

> Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability. . . . *New York Times* and *Butts* effected major changes in the standards applicable to civil libel actions. Under these cases public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability.
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> * * *
>
> Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press. . . . Only complete immunity from liability for defamation would [relieve the media of the burdens of libel litigation], and the Court has regularly found this to be an untenable construction of the First Amendment.

Gannett urges this Court to abandon the balancing approach and to grant the media an absolute license to make statements about foreign officials with knowing or reckless falsity. But this Court has repeatedly recognized that there is no constitutional value in false statements of fact, whatever their subject matter. *E.g., Keeton* v. *Hustler Magazine*, —U.S.—, 104 S.Ct. 1473 (1984); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 340.

> Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation.

St. Amant v. *Thompson*, 390 U.S. at 732.

> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances "which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

Garrison v. *Louisiana*, 379 U.S. 64, 75 (1964) (citation omitted). *See Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 63 (1966) ("malicious libel enjoys no constitutional protection in any context").

Gannett urges this Court to overrule this precedent and to hold that even defamatory statements published with knowing or reckless falsity are absolutely protected under the First Amendment.[7] This new thrust by the media is hardly limited to cases brought by "foreign heads of state." Arguments similar to Gannett's have been advanced and rejected in two recent district court cases. In *Westmoreland* v. *CBS*, 10 Med. L. Rep. (BNA) 2417, 2418 (S.D.N.Y. 1984), Judge Leval dealt with a claim of absolute immunity for "criticism" of highly placed domestic government officials:

> I consider it inappropriate to rule in advance of trial on these novel contentions. The consideration of such far reaching changes in law, not only in the district court but in higher courts on review, is better based on the experience of a full trial record. Accordingly, these branches of

7. The District Court in this case has already ruled that there is sufficient evidence of falsity and actual malice to require submission of the case to a jury. *See DeRoburt* v. *Gannett*, 83 F.R.D. 574 (D. Haw. 1979) (denying Gannett's motion for summary judgment).

> defendants' motion are denied with leave to renew at the conclusion of trial.

In *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. (S.D.N.Y. November 9, 1984), where the plaintiff was and is a cabinet minister in a foreign government, Judge Sofaer rejected the argument outright:

> The short answer to these arguments is that the Supreme Court has already weighed all the considerations *Time* advances and has chosen alternative means for protecting the strong interest in encouraging publication of views relating to official conduct.

Id., slip op. at 27. The *Sharon* court found that the actual malice standard itself gives "the press an especially high degree of protection in suits by public officials." *Id.* The court also noted that the reversal in *New York Times* of the common law rule that the defendant has the burden of proving truth as a defense, coupled with an array of federal and state law privileges such as the opinion and fair report defenses, have the effect of prohibiting "the imposition of liability on any defendant who has acted in good faith." *Id.*, slip op. at 27.[8] Similarly, the recent reaffirmation of the doctrine of independent appellate review in cases where the actual malice standard applies further protects the press from undue liability for defamation. *See Bose Corp.* v. *Consumers Union Inc.*, —U.S.—, 104 S.Ct. 1949 (1984).

If adopted, Gannett's rule would permit the media to elude liability for highly defamatory, utterly false and wholly fabricated statements. Even a totally fabricated story attributed to non-existent "sources" charging that a foreign public official had personally murdered half the population of his country would

8. *Time*'s conduct in the *Sharon* case is not unlike Gannett's conduct here. *Time* stated "it had learned" certain facts regarding General Sharon. Similarly, here, the articles state that "sources said" that President DeRoburt committed the alleged acts. As in *Sharon*, "the protection of opinion and fair comment should not be expanded to encourage the press, with actual malice, to pass off its opinions or findings in a form that unfairly enhances the weight these opinions would otherwise receive in public debate." *Id.* at 30.

be absolutely immune. Such a rule would completely abolish the longstanding belief embodied in the decisions of this Court that all individuals have a fundamental interest in their reputations. *See, e.g., Herbert* v. *Lando*, 441 U.S. at 169; *Time, Inc.* v. *Firestone*, 424 U.S. 448, 455-57 (1976); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 348-49. In the words of Justice Stewart:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

Rosenblatt v. *Baer*, 383 U.S. 75, 92 (1966) (concurring opinion). *See also Herbert* v. *Lando*, 441 U.S. at 195 (dissenting opinion of Marshall, J.).

Access to the media (even if Gannett had presented evidence of it) is an inadequate substitute for a defamation action. "[A]n opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344 n.9. *See Bruno & Stillman, Inc.*, v. *Globe Newspaper Co.*, 633 F.2d 583, 589 n.5 (1st Cir. 1980) ("The 'access to media' argument is no more than a makeweight."). Gannett's access to the media argument would vitiate an important goal of the law of defamation, that of deterrence. As Justice Stewart has recognized:

> Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

Rosenblatt v. *Baer*, 383 U.S. 75, 93-94 (1966) (concurring opinion). *See id.* at 86 (society has a "strong interest in preventing and redressing attacks on a reputation.").

Similarly, Gannett's reliance on the normative conclusion that a public official is less deserving of reputational protection because he has "assumed the risk" of adverse publicity, whatever it may mean in the context of a qualified privilege or immunity, is not compelling here. Absolute immunity would result in considerable unfairness to the public official who would be left entirely at the mercy of deliberate or reckless attacks on his reputation. *See, e.g., Goldwater* v. *Ginzberg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). No public figure or public official forfeits entirely his right to vindicate reputational injury and no public policy is served by mandating such forfeiture. Due to their prominence, these individuals are in some ways "more likely to suffer from malicious attacks than are private citizens." *Appleyard* v. *Transamerican Press Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).[9]

B. Calculated or Reckless Falsehood Regarding the Official Conduct of Foreign Heads of State Is Not Absolutely Protected Under the Ninth Amendment

Gannett next argues that the Ninth Amendment coupled with national tradition exemplified by the Declaration of Independence grant it absolute immunity—the equivalent of a license to defame foreign heads of state. Since no court has ever recognized such a Ninth Amendment right, Gannett is forced to rely on its perception of history. Its argument is entirely meritless.

9. If accepted, Gannett's arguments based on "media access" and "assumption of the risk" could not logically be limited to foreign heads of state. Certain domestic public officials and many public figures enjoy infinitely greater access to the media than do heads of small foreign nations. Are they to be next in the line of fire of the absolute immunity advocates? Moreover, every well-known movie, television or athletic star in this country has assumed the risk of adverse publicity to the same if not to a greater extent than heads of small nations. Media apologists routinely advance the absolute immunity argument notwithstanding this Court's rejection of it in *New York Times*. *E.g.*, A. Lewis, *New York Times* v. *Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment."* 83 Colum. L. Rev. 603 (1983). This Court, not the media and their advocates, has determined that the "central meaning of the First Amendment" does not protect calculated or reckless falsehoods regarding any person, public or private.

With a disrespect for history that would be shocking were its desperation not so apparent, Gannett compares its conduct here—the commercial publication of a news story based on undisclosed sources—with the noble, bold, personal and public statement of grievances by our Founding Fathers against King George III in the Declaration of Independence. King George III was not simply a foreign public official. Rather, he was the despotic ruler of the American colonies during a period of revolution, a ruler whose subjects had every right, under fundamental principles of natural law and justice (as they declared), to cite his oppressive actions while throwing off his unbearable yoke. What the Founding Fathers and the colonial press objected to was the English King's waging of war against the colonies. Their exercise of a basic right—to declare independence from the tyrant—has absolutely nothing to do with the issues in this case.

The only decision of this Court on which Gannett attempts to rely is *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). However, in that case, this Court concluded that the public's right of access to criminal trials is necessary to protect First Amendment rights, not that the Ninth Amendment independently elevates that historical right to constitutional dimensions. This Court concluded, "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" *Id.* at 580 (citation omitted).

The *Richmond Newspapers* decision does not assist Gannett. First, an individual's right to vindicate his reputation is one "which people have exercised for centuries." By contrast, the conditional privilege for publicly disseminated false statements of fact regarding public officials is of relatively recent origin. *See, e.g.*, D. Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 891-96 (1949). Secondly, this Court in *Richmond Newspapers* held that an accused has no "right to a private trial." 448 U.S. at 580. This case, however, involves the individual's right to redress for reputational harm. Thus, unlike

Richmond Newspapers, this case involves directly competing fundamental rights which must be balanced.[10] *New York Times* and subsequent decisions have struck the balance and opted for a conditional privilege only. *E.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 342-43. Thirdly, and most importantly, this Court has repeatedly stated that there is *no* constitutional value in false statements of fact. Thus, under the *Richmond Newspapers* reasoning, the purported right of absolute privilege could exist *only* if it emanated from some constitutional guarantee *other than* the First Amendment. Gannett has not and cannot cite to any other such guarantee.

The Ninth Amendment is essentially a rule of construction designed to insure that the maxim *expressio unius est exclusio alterius* would not be applied to the Bill of Rights. *Charles* v. *Brown*, 495 F. Supp. 862, 863 (N.D. Ala. 1980). The Ninth Amendment has never been held to provide an independent source for any substantive right. *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982), *cert. denied*, —U.S.—, 104 S.Ct. 194 (1983); *Sequoyah* v. *Tennessee Valley Authority*, 480 F. Supp. 608, 611 (E.D. Tenn. 1979), *aff'd*, 672 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). Gannett must therefore look elsewhere for the origin of its claimed absolute immunity.

Gannett cautions that "if this action is allowed to proceed to trial, American courtroom doors will be thrown open to foreign leaders using vast national treasury resources whose primary purpose is to suppress published accounts of their and their country's official acts." Petition at 29. Obviously, Gannett's imagined dire consequences are identical to those which failed to convince this Court to adopt an absolute immunity rule in *New York Times* and its progeny. More importantly, Gannett's false characterization of DeRoburt as a foreign official with vast resources capable of intimidating the press ignores Gannett's own conduct in

10. In fact, given the pervasive and strong interest in preventing and redressing attacks upon reputation, *Rosenblatt* v. *Baer*, 383 U.S. at 86, Gannett's argument would support the view that DeRoburt's rights are also protected under the Ninth Amendment.

this case. One of the largest and most powerful publishers in the world, Gannett is hardly a poor, threatened libel defendant. Armed with libel insurance and its own vast resources, Gannett has retained a battery of competent lawyers to engage in protracted litigation fraught with delay and obstruction. For example, Gannett's attorneys have made numerous burdensome motions in this case, with the latest motion for dismissal on the pleadings made just two months before the scheduled trial in this action. The portrayal of Gannett as a champion of justice with limited resources to defend against this action is inaccurate at best.

Gannett further contends that "a head of state libel plaintiff can control access to vital documents, information and witnesses necessary to adequately defend the libel action." *Id.* at 23. Again, this argument ignores Gannett's conduct in this case. As noted above, a Gannett editor deliberately destroyed documents essential to plaintiff's case to prevent their being subpoenaed. Further, Gannett has steadfastly refused to reveal the purported confidential sources on which its defamatory statements were solely based. Finally, in the face of overwhelming proof of falsity, *see* discussion *supra*, Gannett continues its disingenuous assertion that the articles' statements about DeRoburt are somehow true. *E.g.*, Petition at 6 n.2. The words of Judge Sofaer about the defendant *Time* in his recent *Sharon* decision are peculiarly apt to describe Gannett's posture:

> That this [litigation] process has proved enormously expensive, and painfully contentious, is as much the product of Time's all-out litigation strategy as of any plan by plaintiff to intimidate the press. Despite the fact that every single Time witness claims to have had no evidence that plaintiff knew in advance that the massacre would occur, Time has chosen to pour enormous resources into proving precisely that. Time may be entitled to enhance through such tactics the risks plaintiff faces in suing for defamation. But it would be pure fantasy to treat Time in this case like some struggling champion of free expression, defending at great risk to itself the right to publish its view of the truth.

Sharon v. *Time, Inc.*, slip op. at 31.

Gannett contends that "the factors to be balanced in a case where a foreign head of state brings a libel suit for statements about his official acts are substantially different from those in libel cases involving domestic public officials." Petition at 23-24. Not only does Gannett fail to give a single reason to justify this conclusion, it ignores the greater access to the American press which domestic public officials enjoy. On the Island of Nauru, there are no daily or mass media. The only means by which Hammer DeRoburt can restore his reputation is this lawsuit. He is entitled to his day in court.

CONCLUSION

For all the reasons set forth above, this Court should deny the Writ of Certiorari in this case. Only the development of a full trial record will permit proper adjudication of Gannett's act of state argument which, in any event, is meritless. The press is not entitled to an absolute license to defame foreign government officials.

Respectfully submitted,

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